IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1648

WINSTON JAMES THOMPSON,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, entered on March 10, 1975, affirming petitioner's conviction of uttering a forgery by the Circuit Court of Copiah County, Mississippi.

OPINION BELOW

The opinion of the Supreme Court of Mississippi, affirming petitioner's conviction, is reported at 309

So. 2d 533 (Miss. 1975), and is set out in Appendix A. Rehearing was denied on March 31, 1975.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on March 10, 1975. A timely petition for rehearing was denied on March 31, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the petitioner's right to due process of law under the Fourteenth Amendment was denied by the trial court's exclusion of the testimony of an attorney at law as to a confession of guilt of the crime with which petitioner was charged which was made to the attorney by a third party who was unavailable to testify at petitioner's trial.

2. Whether the petitioner's right to due process of law under the Fourteenth Amendment was denied by the combination of the exclusion of the confession of the third party, and by the action of the trial court in permitting proof of the factual details of a misdemeanor to which, although he professed his innocence, petitioner had pleaded guilty.

STATEMENT OF THE CASE

Petitioner was indicted by the grand jury of Copiah County, Mississippi, for uttering a forgery (R. 2). His first trial ended in a mistrial when the jury was unable to agree on a verdict (R. 18), but petitioner was convicted at his second trial and was sentenced to serve eight years in the Mississippi State Penitentiary (R. 224).

According to the state's proof, someone using the name Wade Moore presented a check in the amount of

$3,840.00 payable to Wade and Mary Moore to the Bank of Hazlehurst on February 11, 1972. Pursuant to that person's request, $2,000.00 was deposited to Wade Moore's savings account and the balance of $1,840.00 was paid to him in cash. It developed that the check was a forgery. Three witnesses identified the petitioner as the person who uttered the forged check and received the money. Petitioner denied having done so, and offered the testimony of B.R. Shows, a physician, that petitioner was in Shows' office the afternoon that the crime was committed, and could not have gotten to the Bank of Hazlehurst by the time that the state contended the crime was committed (R. 115-20).

Thus, the case called upon the jury to decide which witnesses to believe. Petitioner contends that the scales were tipped against him, and his right to due process of law denied, by the combination of two actions of the trial court, which allowed the state to present to the jury all the evidence which it had to support conviction, and prevented petitioner from presenting his affirmative defense that the crime had been committed by someone else.

During cross-examination of petitioner, petitioner readily admitted that he had been convicted of false pretenses in Jones County, Mississippi about thirty days earlier (R. 164). Over petitioner's strenuous objections (R. 164-71), the state was allowed to show that petitioner pleaded guilty to a misdemeanor charge of false pretenses which grew out of the passing of a forged check at a bank in Laurel, Mississippi, on the same date, and in which the same modus operandi were used (R. 171). Petitioner, while readily admitting that he pleaded guilty to the false pretenses charge, denied that he was guilty of the crime (R. 171, 181), and explained that the guilty plea was entered because the state had agreed to reduce the charges to a misdemeanor and because it would have cost petitioner too

much money to defend both charges against him (R. 183). Petitioner again contended that the trial court erred in permitting the state to show the details of the false pretenses charge in Jones County, Mississippi, in his motion for a new trial (R. 228) and in his Brief to the Mississippi Supreme Court. Petitioner also contended, in his Petition for Rehearing to the Mississippi Supreme Court, that his right to due process of law under the Fourteenth Amendment was denied by the combination of the admission of this evidence and the exclusion of the third party's confession, which is discussed in the next paragraph of this Petition.

Out of the presence of the jury, W.S. Moore, an attorney (R. 185), testified that at one time he had represented petitioner on the charges in both Jones and Copiah Counties. While he was representing petitioner, on a Saturday night in August or September, 1972 (R. 188, 190), he met in his office with petitioner and a person who said he was Robert Carr Davis. Davis told Moore that he had committed both crimes, and that petitioner was not guilty of either (R. 190-91). Davis stated that he would call Moore, and that he would make restitution (R. 192). On September 13, 1972, Davis left a message with Moore's secretary that he was at the Jackson Airport, and had money to give Moore, which Moore took to mean money for restitution (R. 192). Moore did not find Davis that day and his considerable efforts to find him since that day had been fruitless (R. 192-93). Moore's testimony was consistent with four written exhibits which were introduced into evidence (R. 194-A, 194-B, 194-C), and would have been corroborated by petitioner (R. 195-96). The state objected to Mr. Moore testifying in front of the jury on the grounds that he would testify to heresay (R. 195), and the trial court sustained the objection

(R. 199). During the hearing in chambers (R. 195-97), in his motion for new trial (R. 228), in his Brief to the Mississippi Supreme Court, and in his Petition for Rehearing to that court, petitioner contended that the Fourteenth Amendment guarantee of due process of law gave him a right to have Moore testify in front of the jury about the confession, which was a declaration against penal interest, of Robert Carr Davis. In addition, petitioner contended in his Petition for Rehearing, as stated above, that the combination of the exclusion of the confession and the admission of the testimony as to the details of the misdemeanor to which petitioner had pleaded guilty, deprived petitioner of his right to due process under the Fourteenth Amendment.

The Mississippi Supreme Court affirmed petitioner's conviction, and held that (1) "[i]n prosecutions for uttering forgery, evidence of similar transactions committed at or about the same time as the offense charged are admissible for the purpose of proving identity, intent, knowledge or a common scheme to defraud", 309 So. 2d at 534 (Appendix A **infra**), and that (2) because Davis was unavailable at the time of petitioner's trial, testimony as to his declaration against penal interest was not admissible, 309 So. 2d at 535 (Appendix A **infra**). Petitioner's Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

The Mississippi Supreme Court's strict construction of this Court's holding in **Chambers v. Mississippi,** 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)—so that declarations against penal interest are not admissible where the declarant is not available to testify at trial—violates the theory of the **Chambers** opinion.

This Court must one day clarify, for the guidance of state and lower federal courts, when declarations

against penal interest must constitutionally be admitted, and when the operation of more than one state rule of evidence deprives a criminal defendant of his right to due process of law under the Federal Constitution. This case presents this Court with a most appropriate opportunity to do so.

ARGUMENT

In **Washington v. Texas,** 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), this Court said:

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19, 87 S. Ct. at 1923. **See also, Chambers v. Mississippi, supra,** 410 U.S. at 302, 93 S. Ct. at 1049, 35 L. Ed. 2d 297 (1973); **Webb v. Texas,** 409 U.S. 95, 98, 93 S. Ct. 351, 353, 34 L. Ed. 2d 330 (1972); **In re Oliver,** 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948).

While it is also true that the states have the power to promulgate their own rules of evidence, **e.g. Dutton v. Evans,** 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), which are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence," **Chambers v. Mississippi, supra,** 410 U.S. at 302, 93 S. Ct. at 1049, there are limits on this power; "consistent with the constitutional guarantees of compulsory process and a fair trial, these limitations may not be arbitrary." **Wisconsin ex rel. Monsoor v. Gagnon,** 497 F. 2d 1126 (7th Cir. 1974). This is because "when a state procedural rule comes into conflict with a fundamental constitutional right it is clear that the state rule must yield". **Braswell v. Wainwright,** 463 F. 2d 1148, 1154 (5th Cir. 1972). It is from this viewpoint that one must evaluate the two state evidentiary rules involved in this case.

As to the exclusion of testimony relating to the declaration against penal interest, it is established that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." **Chambers v. Mississippi, supra,** 410 U.S. at 302, 93 S. Ct. at 1049. In determining whether the exclusion of a particular statement is an example of the hearsay rule being "applied mechanistically to defeat the ends of justice", the question is whether the statement is deemed to be worth any trust, and if so, how much. **Chambers v. Mississippi, supra,** 410 U.S. at 298, 93 S. Ct. at 1047; C. McCormick, **Evidence,** Section 276, at 670 (E. Cleary ed. 1972).[1]

This Court has on at least four occasions considered a particular declaration against penal interest to be admissible for the purpose for which it was offered. For example, in **Dutton v. Evans, supra,** 400 U.S. at 89, 90 S. Ct. at 219-20 (**see also** the concurring opinion of Mr. Justice Harlan, 400 U.S. at 93, 99, 91 S. Ct. at 222, 224-25), the Court held that a co-conspirator's declaration against penal interest, made after the completion of the crime, was admissible

[1] Most courts and commentators have also required, before testimony of a declaration against penal interest can be admitted, that the declarant be unavailable to testify at the trial. **Rules of Evidence for United States Courts and Magistrates,** Rule 804(b) (3) (1975); C. McCormick, **Evidence, supra.** In this case, however, the Mississippi Supreme Court has read this Court's opinion in **Chambers v. Mississippi, supra,** to require the admission of testimony as to a declaration against penal interest only where the declarant is **available** to testify at the trial. **Thompson v. State,** 309 So. 2d 533, 535 (Miss. 1975) (Appendix A **infra**).

against respondent. In **United States v. Harris,** 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971), Mr. Chief Justice Burger, joined by three other Justices, drew the conclusion that a confidential informant's declaration against penal interest—that the informant had bought illegal whiskey, which was a crime in itself, from the accused—was sufficiently trustworthy to support a search warrant issued to search Harris' premises for whiskey on which the tax had not been paid. Mr. Chief Justice Burger went on:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime . . . . Admissions of crime, like admissions against proprietary interest, carry their own indicia of credibility . . . [h]ere the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search.

403 U.S. at 583-84, 91 S. Ct. at 2082. Two years later in **Chambers** itself, the Court held that the fact that the declarant had confessed under oath to petitioner's attorneys and had also confessed to three friends, furnished the declaration against penal interest with sufficient reliability to constitutionally require that evidence of the statement be admitted before the jury. Finally, in **United States v. Matlock,** 94 S. Ct. 988, 996 (1974), the Court held that a Mrs. Graff's declaration against penal interest, that she was cohabiting out of wedlock with respondent in a particular bedroom, made her voluntary consent to search that bedroom "legally sufficient to warrant admitting into evidence" against respondent the money found during the search.

Furthermore, judges and scholarly commentators have criticized the exclusion of declarations against

penal interest. **Donnelly v. United States,** 228 U.S. 243, 278, 33 S. Ct. 1024, 57 L. Ed. 820, 834-35 (1913) (Holmes J., dissenting); 5 J. Wigmore, **Evidence** Sec. 1477, at 288-89 (3d ed. 1940); C. McCormick, **Evidence, supra,** Sec. 278, at 674-75. Wigmore's view is poignant and strong:

> the only plausible reason of policy that has ever been advanced for such a limitation is the possibility of procuring fabricated testimony to such an admission if oral. This is the ancient rusty weapon which has always been brandished to oppose any reform in the Rules of Evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule that hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.
>
> The only practical consequences of this unreasoning limitation are shocking to the sense of justice; for in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent.

Wigmore, **supra. See also, United States v. Goodlow,** 500 F. 2d 954, 957-58 n. 4 (8th Cir. 1974).

In any event, if attorney Moore had been permitted to testify in front of the jury about Davis' confession. the jury would have been under no obligation to believe

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Davis' declaration or Moore's testimony concerning it, as it is well established in Mississippi that the jury can believe all or part or none of any testimony. **Elliott v. State,** 183 So. 2d 805 (Miss. 1966); **Bond v. State,** 249 Miss. 352, 192 So. 2d 510 (1964). Besides, after petitioner's attorney finished his direct examination, the state would have had the right to fully utilize the "greatest legal engine ever invented for the discovery of truth", 5 J. Wigmore, **Evidence, supra,** Section 1367, under Mississippi's "wide-open" rule on cross-examination. **Baker v. State,** 307 So. 2d 545, 547 (Miss. 1975); **Prewitt v. State,** 156 Miss. 731, 735, 126 So. 824, 825 (1930). In view of the facts that petitioner's first trial ended in a hung jury (R. 18), and the fact that if Moore's testimony had been believed by the jury, petitioner would have been found not guilty, **Hardin v. Estelle,** 365 F. Supp. 39, 44 (W.D. Texas 1973), the exclusion of the confession was certainly damaging to petitioner's defense. **Cf. Washington v. Texas, supra,** 388 U.S. at 16, 87 S. Ct. at 1922.

Indeed, a holding that the Fourteenth Amendment requires the admission of Davis' confession would be consistent with this Court's 1918 observation that it is "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of confident understanding who may **seem** to have knowledge of the facts involved in the case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ." **Rosen v. United States,** 245 U.S. 467, 471, 38 S. Ct. 148, 150, 62 L. Ed. 406, 409 (1918) (emphasis added).

Exclusion of the declaration against penal interest became particularly damaging when it came on the heels of the trial court ruling that testimony as to the details of petitioner's guilty plea to a misdemeanor charge of false pretenses, pursuant to a well-established Mississippi and common law rule of evidence that "[i]n

prosecutions for uttering forgery, evidence of similar transactions committed at or about the same time as the offense charged are admissible for the purpose of proving identity, intent, knowledge or common scheme to defraud." **Thompson v. State, supra,** 309 So. 2d at 534 (Appendix A **infra**). Even though the quoted statement is undoubtedly a correct summary of the law, C. McCormick, **Evidence, supra,** Section 190, at 447-52, the admission of the details of the other crime may well have unfairly prejudiced petitioner's defense. In the words of McCormick:

> [t]here is danger that if the judges . . . content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.
>
> Accordingly, some of the wiser opinions . . . recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.
>
> . . . The leeway of [the trial court's] discretion [empowers] the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its

> probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial.

C. McCormick, **Evidence, supra,** Section 190 at 453-54 (footnotes omitted).

In sum, the question here is whether the combination of two state evidentiary rules prevented petitioner from receiving a fair trial, a fair trial in which the prosecution did not have an unfair advantage, and in which the defendant was not shackled in his efforts to present his defense. In **Chambers,** the Court held that the cumulative effect of the two rules of evidence involved in that case deprived Chambers of the fair trial guaranteed by the due process clause. **Chambers v. Mississippi, supra,** 410 U.S. at 290 n. 3, 294, 93 S. Ct. at 1043 n. 3, 1045. This Court should do the same here. If petitioner were to receive a new trial, in which the declaration against penal interest were admitted, one cannot say whether a different result will or should be reached. It is simply impossible to say beyond a reasonable doubt that the result would be the same if the declaration were admitted. **United States v. Goodlow, supra,** 500 F. 2d at 958; **Wisconsin ex rel. Monsoor v. Gagnon, supra,** 497 F. 2d at 1130 n. 9; **Braswell v. Wainwright, supra,** 463 F. 2d at 1155-56.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Mississippi.

Respectfully submitted,

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June 30, 1975

APPENDIX

APPENDIX A

Winston James Thompson,
alias Percy Young and alias Wade Moore

v.

State of Mississippi.

No. 48317.

Supreme Court of Mississippi.

March 10, 1975.

Rehearing Denied March 31, 1975.

Noble & Noble, Brookhaven, for appellant.

A.F. Summer, Atty. Gen. by John C. Ellis, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before GILLESPIE, INZER and BROOM, JJ.

GILLESPIE, Chief Justice:

Winston James Thompson was convicted in the Circuit Court of Copiah County of forgery and sentenced to eight years in the penitentiary.

According to the state's proof, defendant, using the name Wade Moore and a false address, opened a savings account in the Bank of Hazlehurst with a deposit of $105 on December 6, 1971. On February 11, 1972, defendant entered the bank in the late afternoon and presented a check payable to Wade and Mary Moore. The check was purportedly drawn by Cooper, Allen and Jones, Attorneys at Law, on the Peoples Bank of Indianola, Mississippi. Defendant told the employees of the bank that the check represented the

proceeds of a settlement for the death of his child. The check showed on its face that it was "*Fanial* settlement of auto accident cause number 3-247 in Sunflower County." (Emphasis added). It was purportedly endorsed by the payees and defendant requested that $2,000 be deposited to the savings account with the balance paid to him. This was done and defendant received the $1,840 in cash. It developed that the check was a forgery in that the account and the "cause number" on the check were both false. Several witnesses positively identified the defendant as the person who uttered the forged check and received the money. He denied it and offered an alibi witness, making it a jury question on the issue of identification of the defendant.

1.

Defendant argues that it was error for the trial court to permit the district attorney to question the defendant about the details of his conviction of false pretenses in Jones County, Mississippi.

The question arose during the cross-examination of the defendant. After defendant admitted that he had been convicted of false pretenses in Jones County, the district attorney asked defendant if he negotiated a check at the Commercial National Bank and Trust Company in Laurel (Jones County) on February 11, 1972, which was drawn by Cooper, Allen and Jones, Attorneys at Law, on the Peoples Bank of Indianola, Mississippi, payable to Percy Young and Emma Young in the amount of $4,375, with the notation, "For *Fanial* settlement of auto accident in Sunflower, Mississippi, cause number 23-467." (Emphasis added). Defendant denied that he uttered this check but admitted that he pleaded guilty to an indictment growing out of the uttering of the check.

The two checks (the one described in the district attorney's question and the one negotiated at the Bank of Hazlehurst) were cashed on the same day and were identical except for the amount and the name of the payees. The word "final" was misspelled on both checks.

In prosecutions for uttering forgery, evidence of similar transactions committed at or about the same time as the offense charged are admissible for the purpose of proving identity, intent, knowledge or a common scheme to defraud. Pierce v. State, 213 So. 2d 769 (Miss. 1968); 2 Wigmore, Evidence Sec. 309 (1940). Accordingly, the evidence concerning the Laurel check was properly admitted.

2.

Defendant argues that he was denied due process by the exclusion of the testimony of Attorney W.S. Moore relative to the admission against penal interest made by one Davis, being in effect a confession by Davis to Moore, that he, Davis, and not the defendant, was guilty of uttering the forged checks at Laurel and Hazlehurst on February 11, 1972.

Defendant made a record in chambers in the absence of the jury of the testimony of Attorney Moore. It was stated by Moore that at a time prior to trial when he was representing the defendant the latter came to his office with Robert Carr Davis, and that Davis stated to Moore that he was the guilty party in the two checks involved at the Banks of Laurel and Hazlehurst in February, 1972, and that he did not want the defendant, who was not guilty, to be tried for these charges. Moore also testified that he had not seen or communicated with Davis since the conversation referred to, and Davis' whereabouts were unknown at the time of the trial.

Defendant relies upon Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In *Chambers,* one McDonald had confessed to several persons that he and not Chambers killed the deceased; McDonald thereafter repudiated his confessions but was present when Chambers was tried. *Chambers* held that proof of McDonald's confession was admissible and the case was reversed because this testimony had been excluded.

The Mississippi rule regarding the inadmissibility of declarations against penal interest where the declarant is not available as a witness was announced in Brown v. State, 99 Miss. 719, 55 So. 961 (1911). *Brown* was not overruled in *Chambers,* for in the latter opinion the Court noted that " . . . we need not decide in this case whether, under other circumstances, it might serve some valid state purpose by excluding untrustworthy testimony." 410 U.S. at 300, 93 S. Ct. at 1048. And in *Chambers,* the Court said that "the availability of McDonald [the declarant] significantly distinguishes this case from the prior Mississippi precedent, Brown v. State, *supra.* . . ." 410 U.S. at 301, 93 S. Ct. at 1049.

We hold, therefore that the validity of the rule announced in *Brown* was not undermined by the *Chambers* opinion, and where the declarant is not available his out-of-court declarations against penal interest are not sufficiently trustworthy to justify the Court in making an exception to the hearsay rule.

Defendant raises several other questions which, in our opinion, are lacking in merit and require no discussion.

Affirmed.

RODGERS, P.J., and PATTERSON, SMITH, ROBERTSON, SUGG and WALKER, JJ., concur.

Supreme Court, U. S.
FILED
OCT 14 1975

In the Supreme Court of the United States

OCTOBER TERM

No. 74-1648

WINSTON JAMES THOMPSON,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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1. Whether Petitioner Was Deprived His Due Process Rights by the Mississippi Rule Regarding the Inadmissibility of Declarations Against Penal Interest Where the Declarant Is Not Available As a Witness and a Valid State Purpose Is Served by Excluding Untrustworthy Testimony 5

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In the Supreme Court of the United States

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No. 74-1648

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STATE OF MISSISSIPPI,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Winston James Thompson, alias Percy Young and alias Wade Moore* v. *State*, 309 So.2d 533 (Miss. 1975).

Rehearing was denied on March 31, 1975. A copy of the Opinion is before this Court as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C., Section 1257(3). Petitioner has posed two questions for review; as to petitioner's question number 1, respondent acknowledges the jurisdiction requisites are adequately set forth. However, jurisdiction of petitioner's question number 2, as now before this Court, is improperly invoked through the authority of 28 U.S.C., Section 1257(3) as hereinafter set forth in respondent's argument.

QUESTIONS PRESENTED

1. Petitioner's question number 1 does not accurately state the argument advanced by petitioner. Correctly redrafted, the question should be whether petitioner was deprived his due process rights by the Mississippi rule regarding the inadmissibility of declarations against penal interest where the declarant is not available as a witness and a valid state purpose is served by excluding untrustworthy testimony.

2. As hereinafter set forth, the constitutional issue presented is not properly before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment XIV, Section 1.

STATEMENT OF THE CASE

The review of the facts as presented in the opinion of the Supreme Court of Mississippi (Appendix to the Petition) are accurate and are adopted by respondent in the interest of brevity. Petitioner, however, has grossly misstated one fact in his petition which must be corrected. In his petition at 3, he states:

> . . . the state was allowed to show that petitioner pleaded guilty to a *misdemeanor* charge of false pretenses which grew out of the passing of a forged check at a bank in Laurel, Mississippi, on the same date, and in which the same modus operandi were used (R. 171). Petitioner, while readily admitting that he pleaded guilty to the false pretenses charge, denied that he was guilty of the crime (R. 171, 181), and explained that the guilty plea was entered because the state had agreed to reduce the charges to a *misdemeanor*. . . . (Emphasis added)

Petitioner did enter a plea of guilty to the charge of false pretenses, which charge was reduced from the original indictment for forgery. (R. 178, 183) There is, however, nothing in the record to support petitioner's allegation that such guilty plea was made to a misdemeanor. The sole disclosure in the record to the degree of petitioner's prior conviction was an unrebutted announcement that petitioner had pled guilty to a felony. (R. 206)

To document the degree of petitioner's prior conviction, respondent attaches a copy of the sentence imposed to petitioner's guilty plea. (Appendix A) The sentence of three years in the Mississippi State Penitentiary, which was suspended upon certain conditions, clearly announces

a felony conviction under Mississippi Law. SEE: Mississippi Code Annotated (1972), Section 1-3-11.

Any other portion of the petitioner's statement of the case which is subject to more than one interpretation is fully developed in the body of respondent's argument.

REASONS FOR DENYING THE WRIT

No questions of substance are presented by petitioner's assertions of denial of his rights guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Mississippi Court—that the out-of-court declaration against penal interest was not sufficiently trustworthy to be admissible as an exception to the hearsay rule—is not at variance with the applicable decisions of this Court and thus the issue presented does not warrant expressed or codified judicial interpretation.

The second issue raised by petitioner is both misleading, as petitioner pled guilty to a felony, not a misdemeanor, and is not properly before this Court as hereinafter set forth in respondent's argument. Furthermore, the State Supreme Court did not base its decision on federal or state constitutional grounds.

ARGUMENT

1. Whether Petitioner Was Deprived His Due Process Rights by the Mississippi Rule Regarding the Inadmissibility of Declarations Against Penal Interest Where the Declarant Is Not Available As a Witness and a Valid State Purpose Is Served by Excluding Untrustworthy Testimony.

Petitioner contends that he was denied due process by the exclusion of the testimony of Attorney W. S. Moore. Attorney Moore was called as a defense witness and testified out of the presence of the jury. (R. 185-194) Mr. Moore testified that he formerly represented the appellant on the instant charge and the forgery charge in Jones County. (R. 186-188)[1] Moore stated that at a time prior to trial (sometime in August, September, or October, 1972) when he was representing petitioner, the latter came to his office with a man who said he was Roger Carr Davis. According to Moore, Davis admitted committing both crimes for which appellant had been charged. (R. 190, 191) Moore also stated that restitution was made to the Bank of Hazlehurst by petitioner who stated that he received the money from Davis. (R. 193) Moore testified that he had not seen Davis or communicated with him since the night of the aforementioned conversation, nor did he know where Davis was at the time of the trial. (R. 192, 193)

Petitioner claims that such testimony is admissible as a declaration against penal interest of Roger Carr Davis [Petition for Writ of Certiorari at 5], and that the trial court erred in excluding such testimony.

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1. Mr. Moore also represented petitioner in his Petition for Rehearing before the Mississippi Supreme Court and is presently representing him before this Court.

At issue is the Mississippi rule of evidence which prohibits the admissibility of declarations against penal interests where the declarant is unavailable as a witness. This rule was announced in *Brown* v. *State*, 99 Miss. 719, 55 So. 961 (1911), where the Supreme Court of Mississippi held that such declarations are mere hearsay, and are excluded for that reason, ". . . although other reasons doubtless exist in the uncertainty to which it would subject all criminal proceedings. . . ." 99 Miss. 726, 55 So. 961.

Declarations against penal interest have also been excluded in federal courts under the authority of *Donnelly* v. *United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). The *Brown* and *Donnelly* rules have been recently examined in *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This Court, however, reserved ruling on whether the exclusion of a declaration against penal interest where the declarant is unavailable at trial might serve some valid state purpose by excluding untrustworthy testimony. It was held that under the facts of *Chambers*, the declarations against penal interest were erroneously excluded, for the statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. SEE ALSO: *United States* v. *Goodlow*, 500 F.2d 954 (8th Cir. 1974). The final circumstance which provided assurance of the truthfulness of the extra-judicial statement in *Chambers* was the presence of the out-of-court declarant at trial.

Even where new rules of evidence expand the declaration against interest exception to include declarations against penal interest, such exception will apply only if corroborating circumstances clearly indicate that the proffered testimony is trustworthy. *E.g., Federal Rules of Evidence*, Rule 804(b) (3) (1975).

This cautious approach to adopting the penal interest exception [SEE: *United States* v. *Goodlow, supra* (Ross, J., dissenting)], has as its purpose a method of circumventing fabrication. Advisory Committee's Comment to Rule 804(b) (3).

This purpose could not be better exemplified than in the situation at bar. To hold Davis's out-of-court confession admissible under the penal interest rule would work a travesty on justice, for there is no assurance that Davis even exists. All we have is a statement that "a person who said he was Roger Carr Davis" (R. 190) made an extra-judicial confession. It seems elementary that in order for the penal interest exception to apply, there first must be corroborating circumstances that clearly indicate that the out-of-court declarant is a real and not an imaginary character.

In the instant case there is no considerable assurance of the out-of-court declarant's existence nor is there any considerable assurance that the proffered hearsay testimony is trustworthy. Petitioner states that Attorney Moore's testimony would have been corroborated by petitioner [Petition at 4], yet the only indication of such corroboration was an unsworn statement of petitioner's trial counsel dictated into the record that petitioner would corroborate Davis's admission. (R. 195-196) Trial counsel's statement is not considered as evidence in Mississippi. SEE: *McNeil* v. *State*, 308 So.2d 236 (Miss. 1975). Petitioner did not corroborate Attorney Moore's testimony, in fact he chose not to be present during this testimony but instead preferred to remain in the courtroom while this hearing was conducted in chambers. (R. 186)

The case at bar thus presents a classic illustration of a valid state purpose served by excluding untrustworthy testimony. Petitioner has no standing to complain of any

denial of due process for he has not presented sufficient indicia of trustworthiness either to the existence of the out-of-court declarant or to the reliability of such alleged declaration.

Respondent submits that the instant rule of evidence serves a valid state purpose for "the respect traditionally afforded to the States in the establishment and implementation of their own criminal trial rules and procedures"[2] was not diminished by *Chambers*.

If this Court should desire to clarify when declarations against penal interest must be constitutionally admitted, thereby ending the conflict between *Donnelly* v. *United States, supra,* and Rule 804(b) (3) of the *Federal Rules of Evidence,* it should await a more appropriate vehicle for the expansion of such a constitutional evidentiary principle. The instant case, clearly, is not the proper case for the expansion of such a rule.

2. The Constitutional Issue Presented Is Not Properly Before This Court.

It is well established that a claim of constitutional right, title, privilege, or immunity cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *E.g., Sayward* v. *Denny,* 158 U.S. 180, 15 S.Ct. 777, 39 L.Ed. 941 (1895).

Petitioner admits that this issue was raised for the first time in his Petition for Rehearing to the Mississippi Supreme Court. (Petition for Writ of Certiorari at 5) This petition was denied without opinion. In the absence of a showing to the contrary, it must be assumed that the court's refusal to pass on the federal question was due to

2. 410 U.S. at 302-03.

a lack of proper presentation in the state courts. *Street* v. *New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: KAREN GILFOY
Assistant Attorney General

and

By: JOHN C. ELLIS
Special Assistant Attorney General
Of Counsel

CERTIFICATE

I, John C. Ellis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent in Opposition to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This, the 13th day of October, A.D., 1975.

JOHN C. ELLIS
Special Assistant Attorney General

Miss. Probation Form 3-B (Amended

State of Mississippi

VS. No. 4434

Winston James Thompson

This day into open Court came the District Attorney who prosecutes for the State of Mississippi and came also Winston James Thompson in his own proper person and represented by counsel and was lawfully arraigned upon an indictment lawfully returned by the Grand Jury of 2nd Dist., Jones County, said State, charging the said defendant with the crime of obtaining money under false pretense, a lesser offense, after changing his plea. And being duly advised of all his legal and constitutional rights in the premises and being further advised of the consequences of such a plea the defendant did then and there enter his plea of guilty to said indictment.

Therefore, for said offense and on said plea of guilty it is by the Court ORDERED and ADJUDGED that the said Winston James Thompson be and he is hereby sentenced to serve a term of Three years in the State Penitentiary, and he is remanded into the custody of the Sheriff to await transportation.

Provided however, it having been made known to the court that the defendant has not been heretofore convicted of a felony, and that the ends of justice and the best interest of the public and defendant will be best served, the court hereby suspends the execution of the above sentence for a period of Five Years and the defendant is hereby placed under the supervision of the State Probation and Parole Board, until the court in term time, or the Judge on vacation, shall alter, extend, terminate or direct the enforcement of the above sentence, and the suspension of said sentence is based upon the following conditions:

(a) Defendant shall hereafter commit no offense against the laws of this or any state of the United States, or of the United States;

(b) Avoid injurious or vicious habits;

(c) Avoid persons or places of disreputable or harmful character;

(d) Report to the Probation and Parole Board, as directed by it;

(e) Permit the probation and parole officer to visit him at home, or elsewhere;

(f) Work faithfully at suitable employment so far as possible;

(g) Remain within a specified area to wit:

HINDS County;

(h) Remain within the State of Mississippi unless authorized to leave on proper application therefor;

(i) Support his dependents;

(j) That I do hereby waive extradition to the State of MISSISSIPPI from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the State of MISSISSIPPI.

(k) And, further, that he pay a fine of $3750.00 and costs and do pay $2500.00 on bond forfeiture.

So ordered, and adjudged, in open court this the 19th day of October, 19 73.

James D. Shelton
Circuit Judge

STATE OF MISSISSIPPI

County of Jones

I, Donice V. Knight, Clerk of the Circuit Court, said county and state, hereby certify that the above and foregoing is a true and correct copy of the order entered and recorded in Minute Book 30 page 155-6 of the Circuit Court of said County in the above styled and numbered cause.

This the 19th day of October, 19 73.

Donice V. Knight
Circuit Clerk of Jones County

D. V. KNIGHT By:

A certified copy of this order has been delivered to Probationer, who has been instructed regarding same.

This the _____ day of _____, 19____

_____
Probation Supervisor

I accept the above probation in accordance with the terms thereof.

Name: Winston James Thompson
Probationer

Address: 4318 Wellington Dr. Jackson, Miss.

Sept 75

Karen Holyfield

Mail four copies to: Probation and Parole Board, Jackson, Mississippi.

APPENDIX A1

BEST COPY AVAILABLE